No. 98-678

IN THE
Supreme Court of the United States

LOS ANGELES POLICE DEPARTMENT,

Petitioner,

v.

UNITED REPORTING PUBLISHING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE DIRECT MARKETING ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Statutes:

United States Constitution:

State Constitutional Provision:

Page

Other Authorities:

Page

Cited Authorities

Cited Authorities

This brief is respectfully submitted pursuant to Rule 37 urging that the Court affirm the decision below of the United States Court of Appeals for the Ninth Circuit.[1]

INTEREST OF *AMICUS CURIAE*

The Direct Marketing Association ("DMA") is a trade association incorporated under the Not-For-Profit Corporation Law of the State of New York. Its members are companies engaged in or associated with marketing goods and services through direct response methods, which include, quite importantly, the use of information gained from public sources. Its membership numbers more than 4,000 companies located in all 50 states and more than 50 foreign countries, the great majority of which would, in one way or another, be affected by the judicial approval of a restrictive statute concerning information used for marketing purposes.

DMA members represent every functional level of industry — manufacturing, wholesale and retail. As direct marketing techniques are used by each of them as an integral part of conducting their respective businesses in direct-to-the-consumer selling, any statute that abridges those vehicles of commercial speech must have a significant and direct impact on DMA's membership. Neither DMA nor its members have any interest in, nor would they condone, any activity that truly invades personal privacy. However, what Petitioner and *amici* aligned with Petitioner hold out as the laudable pursuit of privacy protection does not survive scrutiny and creates the potential for inadvertent suppression of public benefit, constitutionally protected speech and the free flow of information, the lifeline of direct marketing.

SUMMARY OF ARGUMENT

Direct-to-the-consumer marketing has become a prominent and enormously important form of commerce in the United

1. Counsel for both Petitioner and Respondent have consented to the participation of *Amicus*, as evidenced by letters filed with the Supreme Court pursuant to Rule 37. No party wrote or financially contributed to the preparation of this brief.

States. It has contributed significantly to the growth of the country's overall economy. Section 6254(f)(3) would preclude that form of selling with respect to California arrestees. There is no compelling state interest in doing so. Section I.

Marketing and commerce were such an integral part of the growth of America in colonial times that First Amendment rights fully protected commercial speech in the same manner that they protected non-commercial speech. Nothing has changed that would alter that initial intent of the Framers. Section II, A.

The receipt of unsolicited commercial messages containing potentially valuable information to the recipient does not constitute an invasion of privacy. No industry has engaged in as comprehensive and far-reaching self-regulation to protect consumer privacy as the direct marketing industry has. There is no demonstrated harm in receiving unsolicited commercial offers. Section II, B.

When considering the arguments proferred by Petitioner in support of Section 6254(f)(3)'s prohibition against the use of arrestee information for commercial purposes and the factors that Respondent relies on to demonstrate the constitutional infirmity of Section 6254(f)(3), it becomes clear that the Ninth Circuit's decision should be affirmed. Not only is there no privacy right violated in allowing arrestee information to be used for commercial purposes, but also the First Amendment requires that such discrimination not be tolerated. Section III, A and B.

Because privacy protection and avoiding potential harm to consumers are not available as valid state interests upon which to justify restricting commercial speech, and because one cannot separate access from use where, as here, information resides in only one place and therefore is not accessible elsewhere, Section 6254(f)(3) fails to satisfy the requirements of the First Amendment. Section III, B and C.

ARGUMENT

I. The Value of Direct Marketing

In the most comprehensive study of its kind, conducted by the WEFA Group[2], the effect of direct marketing on the economy was shown to be dramatic, pervasive and growing more rapidly than the economy in general. Since 1992, the WEFA Group has been commissioned each year to analyze the impact of direct marketing on the U.S. economy. WEFA's most recent results show that U.S. sales revenue attributable to direct marketing was nearly $1.4 trillion in 1998. *Economic Impact: U.S. Direct Marketing Today Executive Summary 1998*, The WEFA Group, October 1998 at 8. Revenues attributable to direct mail solicitation alone were nearly $430 billion. *Id.*

Those enormous revenue figures translate into a similarly impressive and significant impact on other areas of the economy. Among the most notable is employment. It is estimated that more than 24.6 million people are employed as a result of direct marketing, with 7.1 million of them in the direct mail industry. *Id.* at 11.

In both the revenue and employment categories, California leads the rest of the states by large margins, with more than $150 billion in sales and in excess of 1.5 million employed in 1998. *Id.* at 8, 11. Direct marketing not only has a substantial impact on California's economy, it has a demonstrated acceptance level second to none. It is somewhat ironic, therefore, that a California statute attempts to impose a value judgment that is so clearly contradicted by the actions and preferences of its own citizenry. Indeed, it does so without demonstrating any form of harm that would result were commercial use of arrestee information to be permitted.

It is important to bear in mind the many economic and social benefits of direct marketing. An ever increasing number of

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2. The WEFA Group is a prominent economic forecasting organization that was formed in 1987 as a result of the merger between Chase Econometrics and Wharton Economic Forecasting Associates.

businesses — large and small — are turning to this form of marketing to sell products and services. It is an effective and efficient way to communicate information about available goods to targeted audiences.

The benefits to consumers are many. This increased activity has intensified competition, leading to broader consumer choices and sharper competitive pricing. For example, direct mail — including cataloging and an infinite variety of promotions — provides consumers with more specific information on product characteristics, prices and other valuable information than any other major advertising medium.

For many consumers — particularly those who reside away from major metropolitan areas — shopping direct provides special opportunities to seek a wider selection of products than would otherwise be available.

Finally, and most importantly, direct marketing provides maximum convenience because of the virtues of shopping at home. Needless to say, this benefit is of particular significance to the elderly as well as to the increasing number of families with both heads of household working.

There is no demonstrated harm, and much benefit, in allowing marketers to contact arrestees with offers of goods and services that may be of interest, indeed vital, to them. At very least, arrestees themselves should be allowed to choose what they receive and to decide for themselves whether or not it interests them. The state should not preempt that communication process. There is no state interest in banning the commercial use of arrestee information that would allow this form of selling.

II. Nature and History of Direct Marketing

A. The Original Understanding of the First Amendment Was That Truthful Commercial Messages Are Fully Protected[3]

Benjamin Franklin, the first important printer in colonial America, published a catalog in 1744 of "near six hundred volumes in most faculties and sciences." Perhaps the then-novel Quaker idea of selling goods at the same price to everyone induced Franklin to print the following statement on the cover: "Those persons who live remote, by sending their orders and money to said B. Franklin, may depend on the same justice as if present." Franklin's catalog is remarkable for, among other reasons, its early formulation of what was later to become the basic mail-order concept of customer satisfaction guaranteed. The names of Washington, Jefferson, and Franklin in this early genesis of direct marketing are an indelible reminder of how deep its roots are in the history and character of the American people. N. Ross, *A History of Direct Marketing* (1992).

The standard colonial newspaper was almost half-filled with local advertising. L. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766 Hugh Gaine's *New York Mercury* was 70% advertising, and 55% of the *Royal Gazette* was commercial matter. A. Lee, *The Daily Newspaper in America* 32 (1937).[4]

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3. For a fuller development of this topic, fully documented with historical and legal citations, *see* D. Troy, "Advertising: Not 'Low Value' Speech," 16 *Yale Journal on Regulation* 85 (1999). This section of *Amicus*'s brief appears with the permission of Mr. Troy.

4. The majority of the ads which appeared in colonial newspapers would today be considered "commercial speech." K. Middleton, Commercial Speech in the Eighteenth Century, *Newsletters to Newspapers: Eighteenth Century of Journalism* 277 (D.H. Bond & W.R. McLeod, eds., 1977) ("The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services.") Without these ads, the colonial press so important to the Revolutionary cause would not have existed. During the eighteenth century, like today, "[a]dvertising represented the chief profit margin in the newspaper business." *Id.* at 56.

"Advertisements had as much interest as the news columns, perhaps greater interest. . . . Arrival of a new cargo . . . likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe." F. Presbrey, *The History and Development of Advertising* 154 (1929).

The first daily newspaper in the United States was established in 1784 primarily as a medium for advertising. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with advertisements. Presbrey, *supra*, at 161. The name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*) reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. The Boston, New York and Philadelphia newspapers, like most dailies in those years, "used page one for advertising, sometimes saving only one column of it for reading matter." Mott, *America Journalism - A History of Newspapers in the United States through 250 Years: 1690-1960*, 157 (3d ed. 1963).

The full integration of editorial and commercial matters in the press reflected the colonial view that the benefits of freedom of expression extended to the entire spectrum of human endeavors. For example, among the reasons given by the Continental Congress to settlers in Quebec for the importance of a free press was "the advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1744), *reprinted in* B. Schwartz, 1 *The Bill of Rights: A Documentary History* 223 (1971). This view encompassed commercial communications as well. For example, Richard Henry Lee of Virginia — perhaps the leading Anti-Federalist — said in his demand for a bill of rights that "a free press is the channel of communication to *mercantile* and public affairs. . . ." Letter XVI of R.H. Lee, January 20, 1788, in *An Additional number of Letters from the Federal Farmer to the Republican*

151-53 (1962) (emphasis added), *reprinted in Freedom of the Press from Zenger to Jefferson: Early American Liberation Theories* 144 (Leonard Levy, ed., 1966).[5]

Thus, the generation of the Framers understood the value of commercial messages. As the prominent printer-historian Isaiah Thomas, editor of a "violently pro-Revolutionary" newspaper, wrote:

> [Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being

5. The twin concepts of freedom of speech and of the press were considered as two sides of the same coin, serving the same purposes, and were often referred to interchangeably. As the Virginia Gazette said on May 18, 1776, "The *use of speech is a natural right* . . . [and] [p]rinting is a more extensive and improved kind of speech," *quoted in* Miller, *George Mason: Gentleman Revolutionary* 148 (emphasis in original). Thus, this Court has treated the freedom of speech and press as coterminous. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781-83 (1978).

The constitutions of the several states reveal the interchangeable nature of the terms to describe the identical sets of rights. For example, Pennsylvania's 1776 Declaration of Rights stated: "That the people have a right to *freedom of speech*, and of writing, and publishing their sentiments; therefore *the freedom of the press* ought not to be restrained." Pa. Const. art. XII (1776), *quoted in* 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3083 (F. Thorpe, ed., 1909) (emphasis added). *See also* B. Schwartz, 2 *The Bill of Rights: A Documentary History* 658 (1971) (reporting proposed Bill of Rights adopted at the Pennsylvania ratifying convention of 1787, using almost identical language).

Tellingly, Thomas Jefferson's proposed modification to Madison's initial draft of the First Amendment provided that "[t]he people shall not be deprived or abridged of their right *to speak, to write, or otherwise to publish anything but false facts. . . .*" 15 *The Papers of Thomas Jefferson* 367 (J. Boyd ed. 1958) (emphasis added). *See also* L. Levy, *Legacy of Suppression* 174 (1960) ("[F]reedom of speech and freedom of the press, being subject to the same restraints of subsequent punishment were rarely distinguished. Most writers, including Addison, Cato, and Alexander, who employed the term "freedom of speech" with great frequency, used it synonymously with "freedom of the press".

> enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810), *quoted in* D. Boorstin, *The Americans: The Colonial Experience* 328, 415 (1958).

Given the prevalence and importance of commercial messages in colonial America, it is not surprising that the very idea of "the freedom of speech, or of the press" evolved in close connection with the development of advertising. In fact, one of the best-known statements in defense of the freedom of expression was written in response to an attack on a commercial message printed by Benjamin Franklin. In 1731, Franklin printed an advertising notice for a ship's captain. The ad was not part of a newspaper; it was distributed as a stand-alone commercial handbill. The paper simply "propose[d] a commercial transaction," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975)), by seeking additional freight and passengers for the captain's ship. At the bottom of the ad was the note "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers*, The Pennsylvania Gazette, June 10, 1731, *reprinted in 2 Writings of Benjamin Franklin* 172, 176 (1907).

This handbill outraged the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published his *Apology for Printers* which, at that time, was "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, *Printers and the American Revolution in The Press and the American Revolution* 20 (B. Bailyn & J. B. Hench, eds., 1980). Franklin's *Apology* contended that "Printers are educated in the Belief that when

Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers, reprinted in 2 Writings of Benjamin Franklin* at 174.[6] The incident illustrates that, at least to Franklin, the "Opinions" stated even in advertisements should be "heard by the Publick." Thus, America's first sustained defense of freedom of expression, and of the very notion of a "marketplace of ideas," came in response to an attack on commercial speech.[7]

The First Amendment sprang from this background. Its authors were accustomed to the idea that commercial speech had important practical value. Their regard for free expression had been critically shaped by Franklin's defense of a commercial handbill. Thus, when the First Amendment provided categorical protection for freedom of expression without any halfway house for commercial speech, it must be understood to have meant what it said and to have extended its full protection to truthful commercial discourse.[8]

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6. This echoed the sentiment in *Cato's Letters*, that "Whilst all Opinions are equally indulged and all Parties equally allowed to speak their Minds, the Truth will come out." J. Trenchard & T. Gordon, 3 *Cato's Letters* 295 (1733). *Compare Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market") (Holmes, J., dissenting).

7. In addition, one of the major precipitating events of the American Revolution also involved a defense of commercial messages. The Stamp Act of 1765 taxed each newspaper — and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. J. Lofton, *The Press as Guardians of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966).

8. Of course, the government may ban the dissemination of false or misleading commercial messages. *See, e.g., Friedman v. Rogers*, 440

(Cont'd)

B. Self-Regulation

Section 5 of Federal Public Law 93-579, as amended by Public Law 95-38, June 1, 1977, 91 Stat. 179 (codified as a note to 5 U.S.C. § 552a), provided for the establishment of a Privacy Protection Study Commission ("PPSC") composed of seven members, three appointed by the President of the United States, two appointed by the President of the Senate, and two appointed by the Speaker of the House of Representatives.

One of the PPSC's initial and principal directives was to report to the President and the Congress on whether those engaged in interstate commerce who maintain mailing lists should be regulated by federal law. After much deliberation, based on many months of hearings and thousands of pages of testimony, the PPSC concluded that they should not be.

The PPSC's principal reason for reaching the conclusion it did was that "the balance that must be struck between the interest of the individuals and the interest of mailers is an especially delicate one" (Report of the Privacy Protection Study Commission at page 147). The PPSC recognized and respected

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(Cont'd)

U.S. 1, 15-16 (1979). This may be true either because, by definition, such messages are excluded from the First Amendment or because the government is always presumed to have a compelling interest in preventing deception. In any event, such a view comports with the original understanding of the First Amendment, which was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. *See* W. Blackstone, 3 *Commentaries on the Laws of England* 431 (1768); J. Story, *Equity Jurisprudence* §§ 191, 192 (1836); W. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century). The government may therefore police the veracity of commercial speech, whereas its ability to regulate "false" or misleading political speech, for example, is far more constrained. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"). Accordingly, regulation of false or misleading speech under laws such as the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1988), is not unconstitutional.

the importance of direct mail to non-profit organizations, to the champions of unpopular causes and to the many organizations that create diversity in American society. It never seriously doubted the substantial economic significance of direct mail marketing.

In supporting its finding that no legislation or regulation was needed in the mailing list arena, the PPSC showed great respect for the testimony provided by the Postal Service through its then Director of the Office of Product Management, who told the PPSC:

> We can find no evidence that the present use of mailing lists in the direct-marketing process constitutes a significant or peculiar invasion of privacy. The economic pressures of the marketplace provide mailers with a strong incentive to direct their advertisements away from those individuals who might find them annoying. By its very nature, direct mail must be aimed at individuals who have some desire to receive it. Moreover, the recipient of unwanted mail matter has the option of throwing it away. Indeed, an individual probably finds it easier to avoid reading his mail than to escape from any other form of advertising.

Testimony of United States Postal Service, Mailing Lists Hearings, December 11, 1975, at 253-54, incorporated into the Report of the Privacy Protection Study Commission at 149.

Good business practices demand that mailers be responsive to their customers' wishes. No one wants a dissatisfied customer, and no one wants to mail to an individual who is not likely to be responsive. Mailing lists provide the means by which to reach the right audience — people who are interested in getting the message.

The PPSC thus concluded that voluntary self-regulation by the industry, in the form of providing adequate means for people to have their names removed or withheld from lists, was

the appropriate action, not governmental regulation. Established and effective vehicles to that end are DMA's Mail Preference Service and Telephone Preference Service, discussed below, as well as individual mailers' name removal options which provide customers an opportunity not to have their names placed on mailing lists.

The industry's first codification of guidelines came in the mid 1960s with the Guidelines for Ethical Business Practice. Those guidelines, or "codes" as they were called at the time, contained twelve suggested practices for direct marketers to conduct business in an ethical manner. Since that time, the concept of guidelines for the industry has evolved dramatically. Today, the Guidelines For Ethical Business Practice and its companion guides contain articles covering every aspect of a direct marketing promotion, from the development of a list, to the fulfillment of an offer.

The guidelines were developed to exemplify the industry's commitment to conduct its business in an ethical manner. They also are meant as living documents to be utilized as part of a company's business philosophy. Requirements that an offer not violate a consumer's perception of his or her right to privacy is just one of the results of how the concepts behind industry standards are incorporated into the operating procedures of successful direct marketing companies.

In general, the guidelines provide individuals and organizations involved in direct marketing with principles of conduct that are accepted nationally and internationally. Those guidelines reflect DMA's and the industry's long-standing commitment to high levels of ethics and responsibility to the consumer and to the community. They are also part of DMA's philosophy that self-regulatory measures are preferable to governmental mandates. Self-regulatory actions are more readily adaptable to changing techniques, economic and social conditions, and technology and encourage wide-spread use of sound business practices.

The guidelines are enforced by a representative industry committee that reviews promotions in view of the requirements of the guidelines. The committee receives "cases" from consumer advocacy groups, other members of the industry, government and law enforcement agencies, and individual consumers. After the committee follows an elaborate due process procedure in administering the guidelines, the accused violator either changes its ways or faces referral to a law enforcement agency (where the guideline violation also constitutes a violation of law) and, in the case of a DMA member, referral to DMA's board of directors (which may vote for censure, suspension or expulsion from DMA). This self-regulatory process has been enormously successful over the years in getting those companies that have strayed from the letter and spirit of the law and guidelines to change their ways voluntarily.

DMA always has been sensitive to the issue of consumer privacy expectations. While some of DMA's programs have evolved with the ever-growing recognition of the importance of consumer expectation in the privacy area, one of DMA's activities in that area has been in place since 1971 — its widely promoted Mail Preference Service ("MPS") — which provides the means by which individuals may have their names removed from mailing lists.

MPS helps to provide the means to implement consumer choice by allowing individuals who have expressed a desire to have their names removed from unsolicited national mailings to achieve that goal. Typically, national mailers who are about to send their messages to prospects they believe will be receptive to them obtain the MPS computer tapes, compare the names on their prospect lists to those on the MPS tapes and delete those names that match. In that way, MPS provides an individual with the opportunity to get off mailing lists. Since its inception, millions of individuals have requested that their names be removed. DMA encourages and closely monitors MPS usage, seeing to it that as many firms as possible use the service, while

at the same time assuring proper usage through an effective decoy system.

Section 6254(f)(3) eliminates arrestees' right to receive important, albeit commercial, information and removes their freedom of choice by making for them the decision not to receive offers containing valuable information. No arrestee will receive pertinent information or offers because the statute prevents it. Rather than allowing each arrestee the freedom to accept or reject an offer that s/he is entitled to receive, the statute prevents any marketer from learning about an arrestee's need for a particular good or service and, therefore, from providing it.

Effective July 1, 1999, the industry, through DMA, made its Privacy Promise to America. Under that national self-regulatory program, cleared by the Federal Trade Commission, direct marketers are obligated to give notice to their customers before any identifying information about them is transferred to another marketer, and to honor all requests to "opt out" of the marketing process, *i.e.*, not to have their names and addresses transferred. Additionally, marketers are required to subscribe to DMA's Mail Preference Service, and corresponding Telephone Preference Service, which mandate the removal from prospect lists all consumers that have signed up with those free services. In other words, before a marketer will attempt to contact or solicit a prospect, it will run its prospect list against DMA's Mail Preference Service or Telephone Preference Service tapes and will delete all matches, inasmuch as the names on those tapes represent consumers who have chosen not to receive national advertising solicitations from companies with which they do not already enjoy a business relationship.

DMA is unaware of any other industry that has a self-regulatory privacy protection program of the scope and magnitude of the Privacy Promise. It is hard to imagine another industry or profession that goes to the lengths that the direct marketing industry does in order to protect consumer privacy.

It is against that backdrop that the arguments of Petitioner and its *amici* must be measured. It is difficult to understand

how a statute that allows the public disclosure of arrestee identifying information to be published in newspapers or used by private investigators can be viewed as not violating or invading arrestees' privacy, while at the same time viewing the mere receipt of commercial information that may prove valuable to the recipient, and is seen or heard only by the recipient, as such an invasion. The obvious and unavoidable conclusion is that such discrimination is based on the fact that the prohibited messages contain commercial, rather than non-commercial, speech. Section 6254(f)(3) is not content-neutral in that the use to which the arrestee information is to be put defines its content. It is only commercial use, *i.e.*, commercial speech, that is blocked.

III. Balancing Commercial Free Speech With The Right to Privacy

Much, if not most, of Petitioner's arguments, as well as the arguments of *amici* aligned with Petitioner, are bottomed on the assumption that certain members of the public are more offended, in the context of their personal privacy, by receiving commercial communications or information regarding goods and services that may be of interest to them than they are by having private investigators, journalists and members of the press disclose their identities and whereabouts for public gaze. Although this Court is not being asked to determine the accuracy or wisdom of those underlying assumptions, it is being asked to protect the constitutional rights of those who would initiate a commercial communication as well as those who would receive those communications but for Section 6254(f)(3). The history of direct marking in the context of the socio-economic growth of the United States makes it abundantly clear that the American public places great importance on the ability to communicate and receive commercial information.

One cannot separate "access" from "use." Accessing information does not occur in a vacuum. The only thing that distinguishes one person's accessing information from another's is the use to which it is put. Any argument that the statute does

not discriminate based on the content of speech rings hollow inasmuch as it is the intended use of the information that defines the content of the corresponding communication.

Mere invocation of the emotionally charged buzzword "privacy" cannot justify discriminating between commercial and non-commercial speech. Petitioner attempts to justify the discriminatory provision of the statute by deeming commercial speech "disfavored" and attempting to elevate other uses of information to a loftier position. That distinction was never intended by the Framers. Section II A, *supra*. There can be no clearer case of discrimination than is presented here by the statute's singling out one form of speech for favored treatment over another.

Moreover, Petitioner's argument that the statute could have banned all uses of arrestee information, not just commercial use, is an argument that has been widely criticized in the past. *See, e.g.*, A. Kozinski and S. Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990); P. Kurland, *Posadas de Puerto Rico v. Tourism Co.: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wonderous Pitiful"*, 1986 Sup. Ct. Rev. 1. It was also repudiated in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988). ("[T]hat ['greater-includes-the-lesser'] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted).

Petitioner cannot have it both ways.

> Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495-96 (1975).

As the Court has observed: "[o]nce the truthful information was 'publicly revealed' or 'in the public domain' the court could

not constitutionally restrain its dissemination." *Smith v. Darby Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). *Cf., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 630 (1995) (allowing time restriction, not outright prohibition, before members of the Bar could contact victims or relatives "while wounds are still open").

A. The Nature Of A Constitutional Right To Privacy

The issue with which the Court is concerned relates to the responsible use of information for a commercial purpose and whether such use, as Petitioner contends, violates individual rights of privacy and, if so, to what extent. Although it would seem an inescapable prerequisite to any such argument that there be a clear concept of what is meant by "right of privacy," such a concept is lacking.

The constitutional right of privacy, on which the Court has expounded in earlier cases, is not one found or defined as such in the Constitution itself. Rather, as cogently analyzed in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), it is a "penumbra" or "zone" attaching to other Bill of Rights guarantees.

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

> The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct 524, 532, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."

It is, however, quite apparent that, for a state to rely on such a right as the basis on which it claims the right to abridge speech, it would have to establish the privacy right concretely and demonstrate the harm that would occur were it not protected. Surely, it may not be permitted to protect any right of privacy simply as an abstract or philosophical concept. At a minimum, a state should be required to show specifically designated kinds, or at least magnitudes, of harm, or endangerment to individuals, here arrestees, by the mere receipt of certain information. That, then, is the scale against which any statute should measure the impact upon individuals of finding unsolicited mail in their mailboxes or unrequested callers on their telephones.

It is also the level of detriment or endangerment that is necessary to qualify as the "right of privacy (that) is . . . protected by the Constitution. As the Court made clear in *Roe v. Wade*, 410 U.S. 113, 145 (1973):

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Bottsford*, 141 U.S. 250, 251, 11 S.Ct 1000, 1001, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. (Citations and brief discussions thereof omitted.)
>
> These decisions make it clear that *only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty. . .are included in this guarantee of personal privacy.* (Emphasis added.)

Moreover, the Court has made it equally clear that the concept of "liberty" has not singled out other rights as candidates

for special protection. *Paul v. Davis*, 424 U.S. 693 (1976) (reputation or defamation violations have not been converted to constitutional rights of due process even where violated by the government).

Only certain activities within the imprecise definition of a "right of privacy" have received judicial protection. Such matters as those which relate to marriage, procreation, contraception, family relationships, and child rearing and education are the ones for which it has been held that there are limitations on the government's ability to substantively regulate conduct. *Id.* at 713. Absent an infringement of rights in those areas, one does not make out an intrusion into the sphere which is considered to be "private."

In *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. den.*, 391 U.S. 915 (1968), an action was brought against the Commissioner of Motor Vehicles on the ground that the statute permitting the Commissioner to contract with the highest responsible bidder to furnish copies of records of all vehicle registrations was a violation of his "right of privacy" as well as the right of all those similarly situated, inasmuch as it subjected him to " 'considerable annoyance, inconvenience and damage . . . by reason of the large volume of advertising and crank mail and other solicitation to which he was subjected.' " *Id.* at 882. In finding the plaintiff's contentions "plainly unsubstantial," the court dismissed the complaint and stated:

> The mail box, however noxious its advertising contents often seems to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect "the privacies of life."

Id. at 883. Continuing, the court made the simple, yet obvious, and legally incisive statements:

> The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.
>
> * * *
>
> In his contrary thesis, plaintiff proposes to stretch the constitutional dimensions of "privacy" far beyond any reasonably foreseeable limits the courts ought to enforce.

Id. at 883-84. Of special interest was the court's further observation:

> Indeed, questions more troublesome than plaintiff's might arise if the State adopted a policy of "privacy" or "secrecy" with respect to such information.

Id. at 883. *See also Shibley v. Time Inc.*, 40 Ohio Misc. 51, 321 N.E.2d 791 (1974), *aff'd*, 45 Ohio App.2d 69, 341 N.E.2d 337 (Ohio Ct. App. 1975), in which a plaintiff's contention that he and other magazine subscribers had suffered an invasion of privacy by the rental of their names was rejected.

As has already been demonstrated, no harm, and much benefit, accompanies the use of marketing lists. There are no "victims". Marketing lists do not victimize — they are a tool to market products, sell ideas and raise funds and although not everyone will like the product, or accept the idea, or contribute money — few, if any, would feel victimized solely as a result of being asked.

The focus of any statute must be on true privacy questions and not based on nuisance and nuisance only. It is not necessary to elaborate here on the long list of items that people term a nuisance. Suffice it to say that the list is substantial and varies according to the irritation quotient of the person involved. Although there are some nuisances shared almost in unanimity by all, no such unanimity exists concerning the receipt of commercial messages.

To the contrary, the large number of mail order companies with growing lists of satisfied customers would indicate that

the nuisance level of direct marketing ranks far down the list of minor irritations, and to only a relatively small group of individuals. For every person who may be driven to distraction by the presence in his or her mail box of direct mail, there are many others who find such missives unobtrusive, interesting and useful or, at worst, conveniently disposable. In any event, those few who seriously do not wish to receive direct mail are protected by existing industry practices — DMA's Mail Preference Service and, for telephone, Telephone Preference Service, and individual mailer and telephone marketer name withholding and removal options.

B. Section 6254(f)(3) Violates The Mandates of *Central Hudson*

In view of the public benefit and historical as well as legal precedents demonstrating the value and protectability of commercial speech, as well as the lack of any harm in the privacy context that results from commercial solicitation, there is no viable state interest to be achieved by Section 6254(f)(3). Sections I and II, *supra*. Moreover, if there were, the excessive measure of an outright prohibition cannot satisfy the First Amendment's requirements. In this case, the arrestees lose as well.

It is a well-established tenet of constitutional law that the First Amendment not only protects the speaker's right to be heard, but also guarantees the listener's right to receive information of interest.

> Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.

Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 561-62 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S.

60 (1983) (commercial speech is protected even where offensive to some).

In so holding, the Court laid down certain precepts delimiting governmental power to abridge commercial speech, at the same time precluding states from restricting commercial speech easily and excessively.

> The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive. *Id.* at 564.

Subsequently, in *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989), the Court retreated slightly from its "least restrictive manner" requirement and held that a "narrowly tailored" requirement or the need for a "reasonable fit" must be satisfied instead. The Court made it clear that its test did not insist on the absence of any conceivable alternative that was less restrictive, but only that any regulation not burden speech more than is necessary to further the government's vital interest. That test, in turn, was itself reaffirmed. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

However, there could be no more utter or discriminatory means to abridge commercial speech than a prohibition against using otherwise publicly available information for a commercial purpose. There is a constitutional violation, *a fortiori*, where as here that information is available only in one place. Such a ban, which provides no definition or specificity or identification of

the substantial state interest being asserted (beyond invocation of the buzzword "privacy"), and which promotes blanket restrictions, cannot be tolerated. Given that, as a general First Amendment proposition, a heavy burden of proof must be satisfied before protection can be diminished,[9] (*Shelton v. Tucker*, 364 U.S. 479 (1960); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3rd Cir. 1976), *cert. den.*, 430 U.S. 983 (1977); *Terry v. California State Bd. of Pharmacy*, 395 F. Supp. 94, 105 (N.D. Cal. 1975) (three judge panel), *aff'd*, 426 U.S. 913 (1976)), it can only follow that

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9. In *First Nat'l Bank of Boston v. Belloti*, 435 U.S. 765 (1978), the court dealt with a Massachusetts statute prohibiting corporations from making contributions or expenditures to influence the outcome of a referendum unless the question materially affected the property, business or assets of the corporation. Rejecting the need for this restriction on corporate speech, the court stated at page 786: The constitutionality of Section 8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive the exacting scrutiny necessitated by a state imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling", *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (other citations omitted) "and the burden is on the government to show the existence of such an interest," *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Even then, the State must employ means "closely drawn to avoid unnecessary abridgement." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

In *Elrod*, 427 U.S. at 363, the court had written: It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v. Valeo*, 424 U.S. at 65-66; *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . ." *Buckley v. Valeo, supra*, 424 U.S. at 65. Thus, encroachment "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes*, 414 U.S. at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. (Citations omitted.)

something more than an amorphous reference to "invasion of privacy" must be present before an agency of the state may abridge marketers' and consumers' freedom of speech.

Returning to the imperatives set forth by the Court in *Central Hudson*, a statute, in order to dam the free flow of commercial information, (1) must assert a substantial interest to be achieved by restriction on commercial speech and (2) must employ a regulatory technique that must not be disproportionate to that interest.

It is unclear what state interest would be advanced where a statute allows access to arrestee information for purposes of truly public disclosure, yet prohibits access by those who only would communicate with the arrestee. Such a statute does not provide a state interest basis for abridging commercial speech. If other bases exist that do, they must be singled out, and proposed restrictions refined and limited to only so much as would "directly advance the state interest involved." *Central Hudson* at 564. *See also Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995).

It is clear that any across-the-board prohibition would be excessive, and, therefore, would fail to satisfy the constitutional requirements that a narrowly tailored restriction be used, and that it not be disproportionate to a specifically identified, substantial interest of the state. *Edenfield v. Fane*, 507 U.S. 761 (1993) (reaffirming the need to demonstrate the direct advancement of a substantial state interest).

Any argument that a state's imposition involves only "inconvenience" and not an abridgement has been rejected: "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to the government." *Lamont v. Postmaster Gen. of the United States*, 381 U.S. 301 (1965) (concurring opinion at 309).

> Tne dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive

> and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Id. at 308.

Again, under *Central Hudson*'s standards of advancing a substantial state interest in a narrowly tailored manner, a statute may not perpetrate a blanket intrusion on addressees' rights to receive information, including commercial information.

> . . . the statute under consideration, on the other hand, impedes delivery even to a willing addressee. In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose.

Lamont v. Postmaster Gen. at 310.

As earlier discussed, there are many who want and enjoy receiving mail containing commercial information. Accordingly, any statute that in an across-the-board manner interferes with the First Amendment right to be a recipient of information via that medium cannot withstand constitutional scrutiny. It is, after all, the medium about which it has been said:

> The United States may give up the post-office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues.

United States ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (Justice Holmes, dissenting opinion).

Moreover, targeted direct mail solicitations which are not false or misleading may not be, consistent with the First Amendment, categorically prohibited by the state. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). Section 6254(f)(3) denies marketers the ability to get their messages to those who may be most interested. To argue th t denial of access for commercial use does not prohibit speech ignores the reality that without such access the process fails because the marketer cannot otherwise ascertain the basis for the targeting (arrestee

status), and accessing the same person's identity elsewhere and in a different context lacks the pertinent (arrestee status) information.

> But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

Shapero at 473-74.

The Court also observed that:

> . . . the recipient of a letter and the "reader of an advertisement . . . can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,' " . . . A letter, like a printed advertisement . . . can readily be put in a drawer to be considered later, ignored or discarded. . . . [It is] conducive to reflection and the exercise of choice on the part of the consumer. . . . Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large.

Id. at 475-76.

The Court also recognized that "merely because targeted, direct-mail solicitation presents [one] with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech". *Id.* at 476. In addressing the *Central Hudson* requirements, the Court reaffirmed:

> And so long as the First Amendment p tects the right to solicit . . . business, the State may claim no substantial interest in restricting truthful and non-deceptive . . . solicitations to those least likely to be read by the recipient.

Id. at 479.

Depriving marketers and arrestees of the ability to send and receive, respectively, information of interest to them fails under this Court's standards as articulated in *Central Hudson*.

C. Section 6254(f)(3) Does Not Employ The Least Restrictive Measures

Federal statutes directly pertinent to direct marketers already have taken advantage of the industry precedent that requires one to honor consumer requests. *See* Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (requiring notice of information practices to consumer and consumer's ability to opt out of the marketing process); *Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874 (10th Cir. 1992); *see also Warner v. American Cablevision of Kansas City, Inc.*, 699 F. Supp. 851 (D. Kan. 1988); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (requiring notice and opt out); Telephone Consumer Protection Act of 1991 (effective December 20, 1992), 47 U.S.C. § 227 (requiring notice and opt out); Driver Privacy Protection Act, 18 U.S.C. § 2721 (requiring notice and opt out). All of them allow a customer to "opt out" of the marketing process and not have his or her name transferred to other marketers. Section 6254(f)(3) short circuits that process, prevents marketers from communicating and denies arrestees the right to receive valuable information and to exercise their freedom of choice. The outright ban of Section 6254(f)(3) does not satisfy the least restrictive measures/narrowly tailored requirement of *Central Hudson*. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Less restrictive measures are available. Petitioner cannot demonstrate satisfaction of the *Central Hudson* requirements. There is no paramount state interest being asserted and the restriction is excessive. Moreover, attempting to separate access from use is imaginary where, as here, there is a single source of the information and the use determines the content of the speech.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should, in all respects, be affirmed.

Respectfully submitted,

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